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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Clinton Olsen,

10 Plaintiff,

11 v.

12 Pacific Indemnity Company, *et al.*,

13 Defendants.
14

No. CV-15-01004-PHX-JJT

ORDER

15 At issue is Plaintiff's Motion for New Trial (Doc. 109), to which Defendant filed a
16 Response in opposition (Doc. 115) and in support of which Plaintiff filed a Reply
17 (Doc. 117). No party requested a hearing on the Motion and the Court finds oral argument
18 would not assist in its resolution. LRCiv 7.2(f).

19 The parties tried Plaintiff's breach of contract claim to a jury over five days in
20 October 2017.¹ At trial, counsel for both parties ably and professionally presented and
21 argued the evidence available to them; the Court notes the fine quality of the advocacy by
22 all counsel. The jury returned a verdict for Defendant. Plaintiff bases his motion for new
23 trial on the premise that the Court should not have allowed certain evidence about his
24 investments in medical marijuana dispensaries because that evidence unfairly prejudiced
25 him in the eyes of the jury. Plaintiff seeks "a new trial that excludes evidence beyond the
26 fact that he had investments in the medical marijuana business and where he is not

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28 ¹ The Court previously had granted summary judgment to Defendant on Plaintiff's
companion claim for breach of the duty of good faith and fair dealing (Count II) and his
claim for punitive damages. (Doc. 58).

1 compelled to answer questions about his investments or explain how he invested in a not-
2 for-profit business.” (Doc. 117 at 4.)² For the reasons set forth below, the Court will deny
3 the Motion.

4 **I. Legal Standard**

5 Rule 59 provides a district court the discretion to grant a new trial “for any reason
6 for which a new trial has heretofore been granted in an action at law in federal court.” Fed.
7 R. Civ. P. 59(a)(1)(A). “Rule 59 does not specify the grounds on which a motion for a new
8 trial may be granted;” thus courts are “bound by those grounds that have been historically
9 recognized.” *Zhang v. Am. Gem Seafoods, Inc.*, 339 F.3d 1020, 1035 (9th Cir. 2003). The
10 Ninth Circuit has held that “[t]he trial court may grant a new trial only if the verdict is
11 contrary to the clear weight of the evidence, is based upon false or perjurious evidence, or
12 to prevent a miscarriage of justice.” *Molski v. M.J. Cable, Inc.*, 481 F.3d 724, 729 (9th Cir.
13 2007) (citation omitted). A motion for new trial “may raise questions of law arising out of
14 alleged substantial errors in admission or rejection of evidence” by the trial court.
15 *Montgomery Ward & Co., v. Duncan*, 311 U.S. 243, 251 (1940). The authority to grant a
16 new trial is “confided almost entirely to the exercise of discretion on the part of the trial
17 court.” *Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 36 (1980).

18 Where a motion for new trial is predicated on an assignment of error in the
19 admission of evidence before the jury, the court should grant the motion only if it finds
20 1) evidence has been improperly admitted; and 2) the admission of such evidence resulted
21 in prejudice to the party moving for a new trial. *See, e.g., United States v. 4.85 Acres of*
22 *Land*, 546 F.3d 613, 617 (9th Cir. 2008). The first element—whether the evidence at issue
23 was improperly admitted—is evaluated by an abuse of discretion standard. *Id.* A district
24 court in rendering an evidentiary ruling abuses its discretion when

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26 ² Plaintiff’s statement of the relief he seeks in a new trial and the corresponding
27 breadth of the error he charges differs within the briefing. In his Motion, Plaintiff appears
28 to assign as error the allowance of any mention of his investments in medical marijuana
dispensaries, but he narrows the assignment of error in his Reply brief only to the Court’s
compelling him to answer questions requiring the details of his investments, such as how
he invested and through whom. The Court treats with both formulations of the assigned
error.

1 it makes an error of law, when it rests its decision on clearly
2 erroneous findings of fact, or when we are left with the definite
3 and firm conclusion that the district court committed a clear
4 error of judgment.

5 *Id.* The second element—a finding of prejudice—requires a finding that “the court’s error
6 more probably than not [] tainted the verdict.” *Estate of Barabin v. Astenjohnson, Inc.*, 740
7 F.3d 457, 464 (9th Cir. 2014) (internal citations and quotations omitted).

8 **II. Analysis**

9 **A. Prejudice**

10 The Court starts with the second element and concludes that even if the admission
11 of evidence related to Plaintiff’s purported investment in Arizona medical marijuana
12 dispensaries constituted an abuse of discretion, it did not taint the verdict and therefore did
13 not constitute prejudice to Plaintiff. The Ninth Circuit has held that “prejudice is at its apex
14 when the district court erroneously admits evidence that is critical to the proponent’s case.”
15 *Barabin*, 740 F.3d at 465. The evidence Plaintiff charges as wrongly admitted was anything
16 but critical to Defendant’s case.

17 Plaintiff made a claim against his homeowners’ insurance policy to cover a reported
18 burglary and theft of nearly \$170,000 worth of jewelry. When Defendant did not cover the
19 claim, Plaintiff sued for breach of the insurance contract. For Plaintiff to prevail on that
20 claim, the jury had to find that, among other things, the claimed loss actually occurred—in
21 other words, that he owned the jewelry and it was actually stolen.

22 Plaintiff told the jury that he had purchased all the jewelry at issue, and when it was
23 stolen, it was in an electronic safe which was locked and hidden under a blanket in his
24 garage and for which only he knew the combination. He also testified that his home was
25 protected by an alarm system monitored by ADT and which was set upon his departure on
26 the evening of he reported a break-in, September 6, 2013. According to Plaintiff’s
27 testimony at trial, and his report to Defendant, the burglar breached a dead-bolted French
28 door on Plaintiff’s back patio to gain access to the house, proceeded to the garage,
29 uncovered and opened the safe and stole all the jewelry claimed in the loss. Plaintiff

1 reported to police on the night of September 6 that when he returned home, the alarm was
2 sounding and that is when he called in. The jury also had before it the following to compare
3 against Plaintiff's bare testimony:

4 The evidence concerning the patio French doors was inconsistent with Plaintiff's
5 testimony that he had engaged the deadbolt before he went out on evening of September 6,
6 2013. Pictures taken after the burglary show that while there was a crack in the wood near
7 the door latch, about halfway up the door, there was no damage to the deadbolt itself or to
8 any of the wood in the deadbolt area higher up the door. This would be improbable if not
9 impossible if the deadbolt was engaged as Plaintiff testified.

10 Examination by the police, the claim investigator, and Defendant's safe expert
11 yielded no evidence that anyone tampered with the safe, and it had no physical or electronic
12 damage. The uncontroverted testimony of the safe expert was that there were only three
13 ways to open the safe without damaging or destroying it: 1) using the owner's unique self-
14 set combination; 2) using the factory key unique to the safe; or 3) resetting the safe to the
15 factory code and using that code.

16 As to the first method, Plaintiff testified that only he had the unique owner code and
17 he did not share it. As to the second, Plaintiff told investigators that he did not recall ever
18 receiving such a key and did not have one, although the expert testified that the maker of
19 the safe at issue did provide a unique key along with each safe at delivery. And as to the
20 third, the expert testified, again without contradiction, that the reset feature could be
21 activated by hitting a reset button inside the safe, and then pressing the factory default code;
22 however, if the safe were closed, the only way someone could hit the reset button would
23 be to shove a firm but thin elongated object, such as a coat hanger or "slim jim" lock opener,
24 between the door seams of the safe and inside the safe to depress the reset button, and that
25 would necessarily leave scratches and other tampering damage. No such damage was found
26 on the safe.

27 The jury also heard substantial evidence that Plaintiff had manipulated the alarm to
28 support his version of events. ADT records substantiate that on the night of the reported

1 break-in, it received no signal of any breach of the alarm system from Plaintiff's home, and
2 when Plaintiff called to report the break-in, ADT checked and found no signal was being
3 reported at all from his home. Yet, according to testimony from the ADT technician who
4 was called out to check Plaintiff's alarm the next day, the alarm was enrolled—meaning it
5 had checked in with and was in communication with ADT's monitoring hub—and working
6 properly when he arrived. ADT records introduced at trial also show that shortly before the
7 ADT service technician came to address the issue, Plaintiff's system reestablished contact
8 and enrollment, and then Plaintiff tested the system and called ADT to confirm it was
9 working. Plaintiff never told the tech he had done any of these things.

10 The ADT technician testified that, in light of the evidence set forth above, the most
11 likely explanation for the alarm's failure to send a signal to ADT monitoring during the
12 alleged break-in was that someone disabled it by both unplugging it and removing the
13 battery, thus defeating both power fail-safes and interrupting its connection to ADT
14 monitoring; and then reinstalled the battery the next day, which caused a re-enrollment as
15 recorded in ADT logs on that date and time. According to the ADT technician's testimony,
16 when an alarm is disabled by cutting power, both plug and battery, no report is made to
17 ADT monitoring as the power is cut and the connection is lost. When the battery and or
18 plug are reengaged, however, the home alarm unit automatically contacts and reenrolls
19 with the ADT monitoring base and that activity produces records at the monitoring site, as
20 it did here. This testimony and explanation were entirely consistent with the unchallenged
21 ADT record evidence before the jury of what happened on September 6 and 7, 2013.

22 The jury also had before it the troubling difference between what the ADT
23 technician testified to, as confirmed by the ADT records—that system was working fine
24 when the technician arrived, having reenrolled earlier that day, with Plaintiff calling to
25 confirm and test it—and what Plaintiff told Defendant's investigator, which was that the
26 system was not working when the technician arrived and the technician had to fix it.
27 Defendant argued to the jury that Plaintiff wanted Defendant's investigator to believe the
28 alarm was not working until an ADT technician fixed it. Indeed, that explanation would be

1 far less suspicious to the investigator evaluating a claim of theft than an unexplained alarm
2 failure followed by an unexplained resumption of regular monitoring service.

3 In addition to the inconsistencies in Plaintiff's account of discovering a burglary,
4 Plaintiff was unable to present to the jury any proof that he had purchased the jewelry at
5 issue, that he owned it, or that he even possessed it at the time of the reported break-in. As
6 for proof of income, and therefore the ability to buy the jewelry claimed, Plaintiff could
7 produce no income statements, pay stubs, employment contracts or personnel records from
8 any employer. He testified he had no such records because he was self-employed in all-
9 cash businesses and those businesses kept no records. When questioned about proof of
10 income or assets via income tax records, Plaintiff answered that neither he nor any of his
11 businesses prepared or filed tax returns for any of the relevant years. The jury did see
12 statements from Plaintiff's personal checking account for 2013, wherein Plaintiff's
13 monthly balance ranged between a high of \$3400 and a low of \$166. Plaintiff also claimed
14 part ownership in a nightclub, but he produced no records documenting that ownership or
15 any payments pursuant to such an interest. Without proof of income, the jury could easily
16 find Plaintiff did not have the wherewithal to purchase the nearly \$170,000 in jewelry.

17 Nor did Plaintiff present evidence of actual purchase or ownership of the jewelry.
18 The jury saw no receipts, credit card statements, bank withdrawal records or any other
19 evidence documenting the claimed purchases, or any of them. And while Plaintiff asserted
20 that he purchased approximately 90% of the jewelry from a single individual—Mr. Drayton
21 Williams, with whom Plaintiff claimed to have a personal friendship—Plaintiff produced
22 no evidence for the claim investigator or for the jury at trial from the purported seller of
23 any purchases. Mr. Williams neither testified at trial nor made himself available to claim
24 investigators, nor could he be located for trial, despite Plaintiff's representation to
25 Defendant throughout the claim investigation that the two were in contact. And Plaintiff
26 produced no records, photographs or anything else from Mr. Williams that would prove
27 such purchases ever occurred. Plaintiff had four years from the time he made his loss claim
28 to the time of the trial to do so. He did not.

1 At trial, a jeweler testified Plaintiff had brought some pieces to him for appraisal
2 several months before the claimed loss, and through that witness Plaintiff introduced
3 appraisal forms for several pieces of jewelry establishing high value. But the appraisal
4 forms noted no proof of ownership by Plaintiff of any of the pieces appraised, and the
5 appraiser testified that if proof of ownership had been presented to him, he would have
6 noted that ownership on any associated appraisal form.

7 Finally, the jury heard uncontroverted evidence that Plaintiff did not cooperate with
8 several aspects of Defendant's investigation, which he was required to do as a condition of
9 the policy. During the claim investigation, Plaintiff told Defendant he called ADT the
10 morning after the reported burglary only to make sure the technician was coming to make
11 repairs. But as discussed above, ADT records demonstrate Plaintiff called for a materially
12 different purpose—to confirm his unit already had successfully reenrolled in ADT's
13 monitoring system and to test it. Plaintiff also refused to answer Defendant's questions
14 about his tax return filings, or non-filings, claiming a Fifth Amendment right not to
15 incriminate himself.³ By so refusing to answer, the jury heard, Plaintiff denied Defendant
16 an avenue to confirm or disprove Plaintiff's financial ability to purchase and own the
17 claimed jewelry of such substantial value.

18 Plaintiff also refused to answer the investigator's questions about the nature of his
19 investments in medical marijuana dispensaries that, in the absence of any records to
20 confirm them, similarly kept Defendant from verifying or evaluating his claims of income
21 from those investments. Plaintiff also was shown to have concealed from Defendant,
22 during its investigation, the active phone number for Plaintiff's live-in girlfriend at the time
23 of the reported burglary, Ms. Brazile. The jury heard Plaintiff did this by providing
24 Defendant an invalid number for Ms. Brazile while he used another number to regularly
25 contact her throughout the investigation period, despite knowing Defendant wanted to

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27 ³ While all individuals enjoy a right against compulsion to testify against oneself,
28 the right cannot be used as both a shield and a sword. Plaintiff's invocation of his
Constitutional right against self-incrimination does not excuse his contractual obligation to
cooperate with the insurer's investigation of his claim.

1 contact her to confirm or disprove Plaintiff's representations about Plaintiff's income,
2 ownership of jewelry, and what happened in their shared home on the night of the reported
3 break-in. From the evidence on this issue alone, the jury could have concluded Defendant
4 had no obligation under the contract to pay.

5 The Court is mindful that not every misstatement or failure to remember a fact,
6 either clearly or at all, will serve as a basis for breach of the cooperation requirement of the
7 insured. But demonstrably untrue statements about facts supremely material to a claim
8 investigation, made at or near the time of the occurrence so as to be reasonably fresh in
9 one's memory, clearly could constitute such a breach, as could conscious omissions of
10 material information.

11 The jury had no evidence supporting Plaintiff's claims that he owned or had
12 purchased the jewelry he claimed and voluminous evidence tending to disprove there was
13 a theft. The uncontroverted evidence showed the burglary could not have happened as
14 Plaintiff reported it. There was an utter lack of evidence of any purchases of the subject
15 jewelry, a lack of proof of income sufficient to make such purchases, a lack of evidence
16 that Plaintiff owned the jewelry he claimed beyond his own testimony, and a lack of
17 evidence in some cases of even the existence of the jewelry at issue. Finally, the jury had
18 before it substantial evidence of Plaintiff's non-cooperation with the investigation by
19 omission, misstatement, and refusal to answer questions and provide valid, available
20 contact information of witnesses, in breach of his obligations as insured under the
21 agreement.

22 Against the weight of this evidence, it is highly unlikely a few passing mentions of
23 Plaintiff's claims to have invested in a medical marijuana dispensary, or the fact that the
24 Court instructed him to answer a question as to whom he invested through and how,
25 triggered the jury's verdict for Defendant. In other words, it is far "more probable than not
26 that the jury would have reached the same verdict if the evidence had not been admitted."
27 *Jules Jordan Video, Inc. v. 144942 Canada, Inc.*, 617 F.3d 1146, 1159 (9th Cir. 2010). This
28 is the standard for a proponent of questioned evidence to overcome a presumption of

1 prejudice. *Barabin*, 740 F.3d at 465. Defendant has met that standard. A new trial is not
2 warranted.

3 **B. Evidentiary Error – Abuse of Discretion**

4 Returning to the first factor in the new trial analysis, the Court finds the evidence
5 Plaintiff complains of was properly admitted. As set forth above, Plaintiff urges in some
6 places in his briefing that the Court erred in allowing any mention before the jury of his
7 purported investments in the Arizona medical marijuana dispensary industry; in others
8 Plaintiff urged the error specifically to be the Court’s instruction to Plaintiff, in the jury’s
9 presence, to answer counsel’s question about how he made such investments and through
10 whom. The Court’s analysis and conclusion is the same as to both formulations of charged
11 error.

12 In investigating Plaintiff’s claimed loss by theft of approximately \$170,000 in
13 jewelry, Defendant was entitled to satisfy itself, before paying on the claim, that Plaintiff
14 in fact had the financial ability to purchase and own so much jewelry in the first instance.
15 Because Plaintiff could not produce pay stubs, employment verifications, tax records,
16 business agreements, bank records or any other records at all to substantiate claims of
17 sufficient assets or income, Defendant was entitled to explore all claimed sources of
18 income during its investigation of the claim. And because this investigation and its results
19 constituted the defense in this case, all of Plaintiff’s proffered claims of different sources
20 of income were relevant to the jury’s determination of 1) whether Plaintiff in fact had the
21 ability to make the purchases he claimed to have made, and 2) Plaintiff’s credibility, both
22 to Defendant’s investigator during the claim investigation process and at trial.

23 Plaintiff told Defendant’s investigator he had invested in medical marijuana
24 dispensaries in Arizona and was receiving returns on those investments as a source of
25 income. Defendant introduced to the jury A.R.S. § 36-2806(A), which provides in relevant
26 part that Arizona medical marijuana dispensaries “shall be operated on a not-for-profit
27 basis.” It was relevant and proper for Defendant to raise this contradiction before the jury
28 to test Plaintiff’s claim of income from an investment that Arizona law prohibits.

1 Moreover, it was relevant and fair for Defendant to test Plaintiff's claims that he invested
2 into a new industry that is not only highly regulated but also the subject of close scrutiny
3 by law enforcement, and he could produce no documentary evidence from that regulated
4 entity showing such an investment.

5 For the same reasons that Plaintiff's claim of investment in medical marijuana
6 dispensaries is relevant, so is his ability or inability to answer questions about the
7 particulars of such investment. Where the likelihood of the investment even having
8 occurred has been called into question as set forth above, a Plaintiff's ability to answer
9 questions that flesh out the claimed investment—by identifying with whom he made the
10 investment, what the terms of it were, how it was documented, and the like—bear on the
11 credibility of his claim as well as his own credibility generally. The jury was entitled to
12 know if Plaintiff could credibly substantiate his claims of investment income by supplying
13 such critical supporting information. The information Defendant's questions sought was
14 highly probative for purposes of a Fed. R. Evid. 403 analysis. These issues were all before
15 the jury, and their probative value far outweighed any risk of unfair prejudice—which, as
16 the Court finds, was minimal to non-existent.

17 Plaintiff argues, in the context of the Rule 403 balancing test, that undue prejudice
18 was inherent in associating him in any way with the medical marijuana dispensary industry,
19 and allowing evidence of his claimed investment in it was akin to making him look like a
20 “drug dealer”—in essence, the evidence was being introduced to “dirty him up.”
21 (Tr. 09/18/17 at 74:23 – 75:10) The Court disagrees. First, in 2010, the citizens of Arizona
22 voted by referendum to legalize medical marijuana in the state. *See* A.R.S. §§ 36-2801 *et*
23 *seq.*, (the “Arizona Medical Marijuana Act”) (effective December 14, 2010). That vote
24 represented the will of a majority of the voters of Arizona. Plaintiff's argument that
25 questions about his association with the operation of state regulated dispensaries of a
26 substance which, subject to regulation, is and has been legal for nearly ten years under state
27 law does not constitute prejudice before the jury.

1 Second, and more importantly, Defendant's argument was never that Plaintiff was
2 involved in medical marijuana as an investor. To the contrary, Defendant's introduction of
3 Plaintiff's claims—and the lack of evidence to support those claims—was intended to
4 prove that Plaintiff had no such investments and thus no associated source of income, just
5 as Defendant argued Plaintiff had no income streams from nightclub investments or any
6 other source to support his claim of having sufficient assets to buy nearly \$170,000 worth
7 of jewelry. It was the theory of the defense that Plaintiff made up the investment and had
8 no such associated income. When offered for this purpose, admission of the evidence does
9 not constitute undue prejudice.

10 In any event, Plaintiff now urges it was error for the Court to instruct him to answer
11 questions about the details of his claimed investment. The Court is particularly
12 unpersuaded by such an argument when it gave the instruction at Plaintiff's counsel's
13 urging.

14 At trial, Defendant's counsel questioned Plaintiff as to whether he failed to
15 cooperate with the claim investigation by refusing to answer questions about his claimed
16 dispensary investment. Plaintiff indicated he did not refuse to answer the question about
17 his dispensary investment at his examination under oath. (Tr. 10/18/17 at 268:14-17.)
18 Defense counsel reminded Plaintiff that he had told the examiner he had a confidentiality
19 agreement that prohibited him from answering the examiner's question. (*Id.* at 18-21.)⁴

20 Defense counsel then asked Plaintiff, "Please tell the jury who the owner of the
21 business is. Who do you work with in the medical marijuana dispensary?" (*Id.* at 268:24-
22 169:1) Plaintiff answered, "I cannot say because it's a confidentiality agreement." (*Id.* at
23 269:2-3) At defense counsel's request, the Court instructed Plaintiff to answer the question,
24 but then convened a sidebar before the witness could respond. At sidebar, Plaintiff's
25 counsel indicated that while he did not know with whom his client had a confidentiality
26 agreement, he was concerned that in answering the question, his client might be exposed
27 to liability for violating such an agreement. The following exchange ensued:

28 ⁴ Plaintiff produced no such confidentiality agreement in discovery or at trial.

1 Mr. Moring [Plaintiff's counsel]: Your Honor, if he has a
2 contract with another party that says that—I mean, I guess if
3 he's limited.

4 The Court: He's under oath in a federal trial.

5 Mr. Moring: Judge, I believe that he's—if he could just say—
6 I don't know who it is but I don't want them coming in here
7 and saying “Judge, if you stand here and tell him ‘I'm telling
8 you’—I have a contract and we have a confidentiality
[agreement] and it has a court order provision in it.”

9 The Court: I understand your position now, which is not that
10 he has the right to refuse to answer a question in this
11 proceeding—

12 Mr. Moring: --That's not my position, Judge. That he has a
13 contractual obligation and—

14 The Court: --it is just due to the Court's Order, not his
15 voluntarily ignoring the—

16 Mr. Moring: --that's exactly what my concern is.

17 (*Id.* at 269:13-270:5.) Plaintiff's counsel stated his concern that the record should be clear
18 that Plaintiff answered questions about other persons with whom he invested in the
19 dispensaries at the instruction of the Court and did not willingly violate any confidentiality
20 term of an investment agreement. The Court obliged by then instructing the witness as
21 follows: “Mr. Olsen, I will instruct you that as a matter of law, and under the authority of
22 this Court you must answer that question.” (*Id.* at 270:8-10.) Plaintiff's counsel sought the
23 instruction. He cannot charge as error that which he invited.

24 Finally, Plaintiff initially argued in his Motion for New Trial that the Court erred in
25 allowing any evidence of his statements that he invested in medical marijuana dispensaries
26 because such investments post-dated his purchase of the jewelry that was the subject of the
27 claims, and therefore any income associated with such investments was irrelevant to his
28 ability to purchase the covered items. (Doc. 109 at 1–2.) This argument fails. Plaintiff's

1 Motion *in Limine* to preclude mention of the medical marijuana investments, as renewed
2 at trial, never mentions this timeline argument. (Doc. 70.) Its sole focus is on the fact that
3 medical marijuana is permitted under Arizona law and the argument that Defendant only
4 raises the investment to associate Plaintiff with “drug sales.” *Id.*

5 Despite Plaintiff’s failure to raise the timing of the investment in temporal relation
6 to the purchase of any jewelry, at oral argument on the motion the Court *sua sponte* raised
7 the issue:

8 THE COURT: Mr. Moring, is Plaintiff claiming he received
9 income from his investment during the relevant time period—
10 from his marijuana dispensary investment during the relevant
time?

11 (Tr. 9/18/18 at 72:5-7). Plaintiff’s counsel, presented with direct opportunity to adopt the
12 argument that the dispensary investments occurred at a time that made them irrelevant to
13 Plaintiff’s available resources to purchase the jewelry, did not adopt this position. He
14 simply continued to argue that associating Plaintiff with marijuana generally prejudiced
15 him. Counsel’s answer in full to the Court’s inquiry about whether Plaintiff was arguing
16 that the marijuana investment was at a time irrelevant to the inquiry into his ability to
17 purchase, was as follows:

18 MR. MORING: He did receive income from his medical
19 marijuana investment, Your Honor, and the nature of that
20 discussion was during his examination under oath so this is
21 sworn testimony in front of Mr. Weisbarger, the prior counsel.
22 And he talks about additional investments. He talks about he
23 makes investments in what I could call speculative companies,
start-up companies. He owned a nightclub. He talked about
that. He also talked about his marijuana investment.

24 So, Your Honor, the critical question is not whether or not Mr.
25 Olsen had investments and investment income. I believe, and
26 this is sort of a developing area of law, that’s why I thought I
27 would provide the Court with some guidance from the Utah
28 district court that we have a specific issue here particularly with
regard to medical marijuana. Those investments are legal under

1 Arizona law and they have the serious potential to prejudice
2 the jury.

3 So much like you've suggested earlier about sanitizing things
4 I think it's fair game for [the defense] to talk about investment
5 income and he has investments. He makes money. However
6 they want to go about that. The nature of those investments,
7 particularly the marijuana investment, is not germane and has
8 a significant chance of prejudice.

9 (*Id.* at 72:8 – 73:4.)

10 The Court went on to highlight the relevance of the claimed medical marijuana
11 dispensary investments insofar as they demonstrate or fail to demonstrate an ability to buy
12 over \$168,000 worth of jewelry:

13 I think that it's [the dispensary investment evidence is]
14 germane because the jury is entitled to evaluate the credibility
15 of that as a source for income when it is a business that one
16 would expect certainly there being some kind of records on and
17 the jury can evaluate from that whether or not that business or
18 any other business, whether it's a nightclub or something else
19 noncontroversial, is paying somebody in cash, and maybe
20 sometimes that makes sense and maybe it doesn't, but they
21 need the context to know whether that's the case.

22 (*Id.* at 74:5-13.) Again, Plaintiff's counsel made no mention of the timing of the investment
23 being irrelevant, and focused only on the prejudice of Plaintiff being associated with
24 marijuana:

25 This is a particular subset of that cash investment business
26 It's the mere mention—because it is to dirty him up. The idea
27 about bringing that [dispensary investment] is this idea that
28 Clinton Olsen is a drug dealer to dirty him up. To say that Mr.
Olsen is an investor that receives income from his investments,
fair game. I tried to make that clear in my motion *in limine* and
it's this particular nature [dispensary investment] that I think is
unduly prejudicial.

(*Id.* at 74:23 – 75:10.) Plaintiff thus did not raise the argument pre-trial that his dispensary
investments were irrelevant because of their timing in support of his motion *in limine*. Nor

1 did he object at trial on that basis. He therefore has waived that objection and argument
2 here. *See People of Territory of Guam v. Gill*, 61 F.3d 688, 693 (9th Cir. 1995); *Cotton ex*
3 *rel. McClure v. City of Eureka*, 860 F. Supp. 2d 999, 1018 (N.D. Cal. 2012).

4 Moreover, as the Court entertained argument on Plaintiff's re-urging of his motion
5 *in limine* at trial, it addressed precisely the concern Plaintiff did raise at trial and has raised
6 again here—the avoidance of prejudice from mere association with medical marijuana or
7 businesses involving it. The Court noted as follows:

8 My concern is that the jury not hold any preconceived notions
9 that they may have about the propriety of marijuana or medical
10 marijuana against the Plaintiff in this case, not that any
11 instruction would be some broad statement as to the legality or
12 illegality of specific actions, either in the area of medical
13 marijuana dispensary operation or anything attendant to
14 that. . . . What the Defendant's asking me for is a statement of
15 law as to the contours of the medical marijuana law. In other
16 words, to say and carve out that territory of things that cannot
17 be done. That is not what I intend to do. Plaintiff is asking me
18 for a broad pronouncement that medical marijuana is legal and
19 perhaps further than that. That is also not what I intend to do. I
20 want to address the limited nature or limited purpose of the
21 allowance of testimony and questioning on this issue, which is
22 to say "you are not supposed to be thinking about policy
23 considerations about whether medical marijuana is a good
24 thing or not. That is not what this case is about." . . .

25 My instruction is not about defining the contours of what you
26 can do and can't do lawfully under the medical marijuana laws
27 of Arizona. Mine is simply to make sure that the jury is not
28 automatically hearing the word "marijuana" and imputing what
is essentially a 404(b) problem, but focusing them on the [fact
that] there is a legitimate reason for this to be questioned and
that is to evaluate the credibility of the claim that this is income
and this is traceable income. That's it.

(Tr. 10/18/17 at 14:18–15:11; 16:7-16.) Thereafter the Court denied Plaintiff's renewed
motion *in limine* and Plaintiff testified on direct regarding his medical marijuana
dispensary investment. At the conclusion of Plaintiff's direct testimony, the Court gave the
following instruction to the jury:

You have just heard testimony that Mr. Olsen had invested in a medical marijuana dispensary in Arizona and that he had advised [Defendant] that such investment was a source of his income. I instruct you to consider this evidence only for the limited purpose of evaluating the credibility of his claim of potential income. You're not to consider the propriety of medical marijuana dispensaries or any policy or moral questions surrounding medical marijuana. Those questions are not before you in this case and the claims and defenses at issue here do not involve that policy question.

(*Id.* at 136:19 – 137:2.) The jury, thus instructed, is presumed to have followed the law. *Weeks v. Angelone*, 528 U.S. 225, 234 (2000). Any risk of the prejudice animating Plaintiff’s motion *in limine* thus was ameliorated by the instruction.


III. Conclusion

Plaintiff's purported investments in medical marijuana dispensaries were not the focus of Defendant's case. Defendant's counsel mentioned the topic once in opening statement, in passing, once during closing argument, and made it the subject of only a handful of questions to one witness during a trial that spanned five days. Rather, Defendant's focus overwhelmingly was on a dearth of records or other evidence to corroborate Plaintiff's assertion of the purchase, ownership and possession of almost \$170,000 in jewelry and a highly implausible and at least partially disproven account of the theft of said jewelry. The Court did not abuse its discretion in admitting relevant information regarding Plaintiff's claimed investment. And admission of that evidence did not unfairly prejudice Plaintiff. Accordingly,

IT IS ORDERED denying Plaintiff's Motion for New Trial (Doc. 109).

Dated this 26th day of April, 2019.

019.


Honorable John J. Tuchi
United States District Judge